FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 28 1939
CHARLES ELMORE CROPLEY
CLERK

No. 329

IN THE

Supreme Court of the United States

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE A. SPIEGELBERG,
70 Pine Street,
New York, N. Y.
Counsel for Plaintiffs-Intervenors-Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

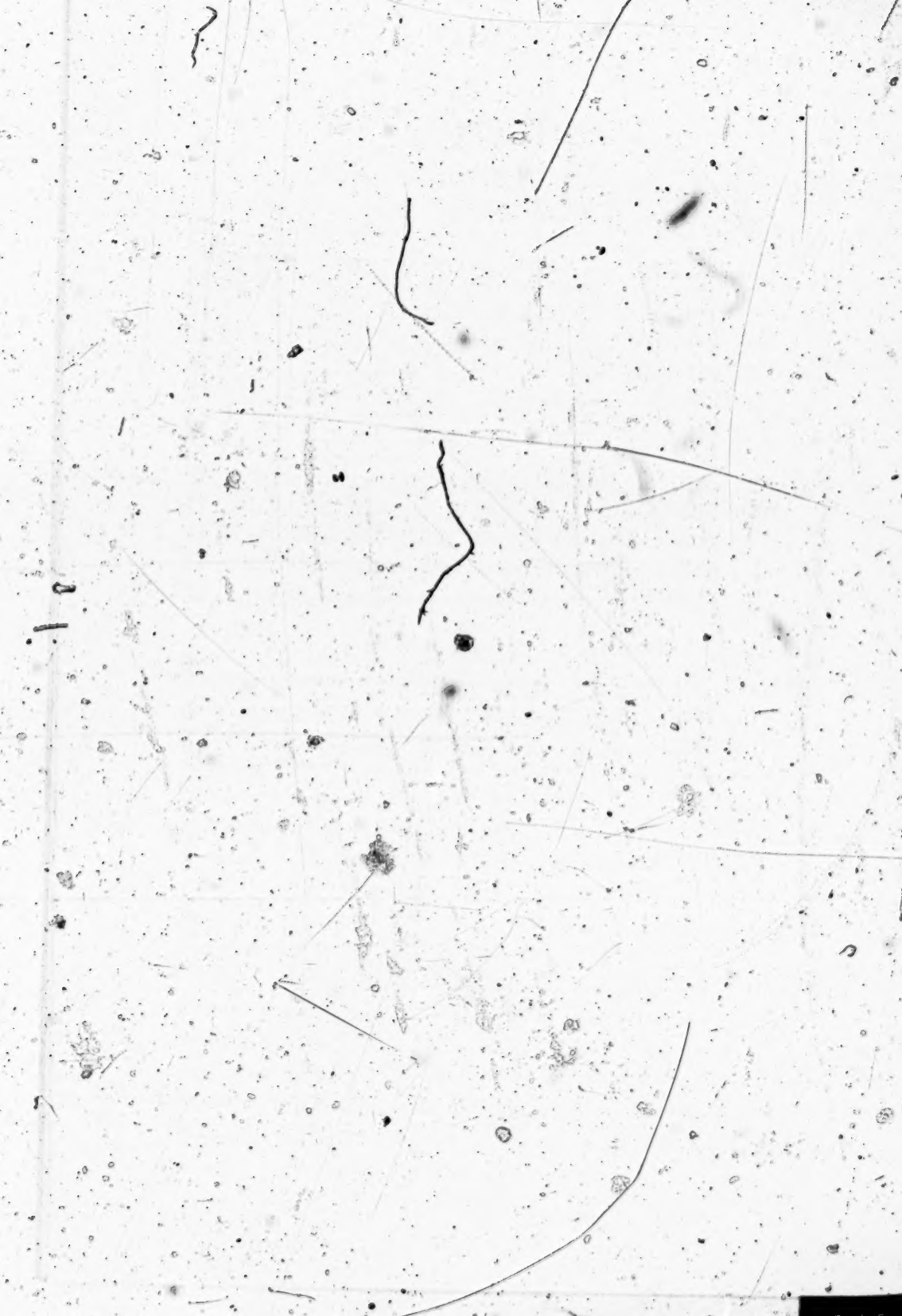
	PAGE
PRELIMINARY STATEMENT	1
Statement of Facts	2
I. The petition raises no question which warrants review by this Court	3
The action is solely cognizable in equity and legal statute of limitations is inapplicable	4
No inequity results to petitioners by virtue of the decision of the Circuit Court	8
II. Stockholders of record of Joint Stock Land Banks are responsible for the statutory liability	9
III. There is no decision of any other Circuit Court of Appeals in conflict with the decision in this case	15
Conclusion	17

Cases Cited.

	PAGE
Adderly v. *Storm*, 6 Hill. (N. Y.) 24	11
Brusselback v. *Cago Corporation*, 85 Fed. (2d) 20; cert. denied 299 U. S. 586	4, 5
Brusselback v. *Cago*, 24 Fed. Supp. 524, 534	11
Cago Corporation v. *Brusselback*, 299 U. S. 586	2
Cago v. *Brusselback*, 85 Fed. (2nd) 20	6
Calhoun v. *Millard*, 121 N. Y. 69, 81-83	7
Casey v. *Galli*, 94 U. S. 673	16
Christopher v. *Brusselback*, 302 U. S. 500	2, 4, 5
Crease v. *Babcock*, 10 Metc. 525	11
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64	5, 7
Friede v. *Mackey*, 10 N. E. (2d) 102 (Supreme Judicial Court of Massachusetts)	11
Groesbeck v. *Morgan*, 206 N. Y. 385, 389	7
Hanover Fire Insurance Co. v. *Morse Dry Dock and Repair Co.*, 270 N. Y. 86	6
Heiden v. *Cremin*, 66 F. (2d) 943	15, 17
Holmberg v. *Anchell*, 24 Fed. Supp. 594	4, 11
Holmberg v. *Beaumont*, 28 Fed. Supp. 100	4
Holmberg v. *Hannaford*, 28 Fed. Sup. 216, 218-19	4
Holyoke Bank v. *Burnham*, 11 Cush. 183	11
Johnson v. *Greene*, 88 Fed. (2nd) 683	15, 16
Kennedy v. *Gibson*, 8 Wall. 498	16
Kenyon v. *Fowler*, 155 Fed. 107, *affirmed*, 215 U. S. 593, on the opinion below	11
National Bank v. *Case*, 99 U. S. 628, 631	11, 12
Pollard v. *Bailey*, 87 U. S. 520 (20 Wall. 520)	2, 4, 5
Pufahl v. *Parks*, 299 U. S. 217	16
Roosevelt v. *Brown*, 11 N. Y. 148	11
Rundle v. *Allison*, 34 N. Y. 180	6
Schram v. *Poole*, 97 Fed. (2nd) 566	15, 16
Terry v. *Little*, 101 U. S. 216	2, 4, 5
Wheeler v. *Greene*, 280 U. S. 49	2, 4, 5

Statutes Cited.

	PAGE
12 U. S. C. A.,	
Section 62	12
" 63	10, 14, 16
" 64	10, 14, 16
" 66	9, 17
" 191	4, 16
" 192	5, 16
" 717	12
" 731	13
" 733	12, 13
" 744	11, 12
" 810–24	11
" 812	2, 3, 4, 5, 10, 11, 12, 14
" 813	13
" 815	13
New York Banking Law,	
Section 80	5
" 113a	5
" 632	5



IN THE

Supreme Court of the United States

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition is for a writ of certiorari to review the final decree of the United States District Court for the Southern District of New York (R. 397) affirmed by the

Circuit Court of Appeals for the 2nd Circuit on May 29th, 1939 (R. 435-6). The opinions of the District Court (R. 338-349 and 357-364) and of the Circuit Court (R. 420-435) are reported in 20 Fed. Sup. 930, 20 Fed. Sup. 936 and 104 F. (2d) 169.

This Court should deny the petition because: (1) The decision of the Circuit Court of Appeals is in accord with the decisions of this Court in: *Terry* v. *Little*, 101 U. S. 216; *Pollard* v. *Bailey*, 87 U. S. 520; *Wheeler* v. *Greene*, 280 U. S. 49; and *Christopher* v. *Brusselback*, 302 U. S. 500; which clearly enunciate the principles governing the present case; (2) this Court has denied a petition for a writ of certiorari in *Cago Corporation* v. *Brusselback*, 299 U. S. 586, where questions similar to the ones here involved were sought to be raised; (3) the decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals; (4) there are no questions of public interest involved, and (5) the decision of the Circuit Court of Appeals is obviously correct.

Statement of Facts.

This is a representative action by J. S. Todd & Company on behalf of themselves and all other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against defendant stockholders of that bank (R. 3).

The action is brought pursuant to 12 U. S. C. A. Section 812 providing a double liability for shareholders of all joint stock land banks.

The petitioners Russell, Miller & Carey have stated that they were not the beneficial owners of the shares in question (p. 2 of Petitioners' Brief). A finding to that effect

was refused (R. 376, proposed finding 21) for the good reason that it was not supported by proof since it appeared that these petitioners, who were stock brokers, transferred the stock in question to their name upon receiving it from a client (R. 152), although the account in question had had a credit in their client's favor of almost $6,000.00 at the time the stock was received (Exhibit BB-I, R. 337) and there was no proof that the account in question was a margin account. The petitioner Pleasants was a pledgee and transferred the stock in question into his name (R. 151), having made a loan to the prior record stockholder, the Joint Stock, Bond and Share Company (R. 149), of which company the petitioner Pleasants was a director (R. 147).

At the time this suit was instituted in December of 1931 (R. 365), the respondents did not know the extent of the bank's insolvency (R. 370, finding 24, R. 116-7).

POINT I.

The petition raises no questions which warrant review by this Court.

There are only two questions involved in this petition and they are: (a) Do the three-year statutes of limitations of New York and California apply so as to bar the action?—a question which must be answered in the negative, if, as is the case, the action is solely cognizable in equity or if the remedy at law is inadequate, and (b) Are record holders of stock in a Joint Stock Land Bank liable as shareholders within the purview of 12 U. S. C. A., Section 812?

The action is solely cognizable in equity and the legal statute of limitations is inapplicable.

The statute in question imposes an equal and ratable liability for the benefit of all creditors (12 U. S. C. A., Section 812). Where those circumstances exist this Court has definitely stated that the liability must be enforced by the creditor in a representative action in equity.

> "The only means of enforcing a liability left to creditors of a joint stock land bank, as the Court pointed out in the *Wheeler* case is an adversary suit in equity against the stockholders wherever they may be found."
>
> *Christopher* v. *Brusselback*, 302 U. S. 500, 502;
> *Wheeler* v. *Greene*, 280 U. S. 49;
> *Terry* v. *Little*, 101 U. S. 216, 217-8;
> *Pollard* v. *Bailey*, 20 Wall. 520, 525.

In accordance with the decisions of this Court above cited are the decisions of lower Federal Courts.

> *Brusselback* v. *Cago Corporation*, 85 Fed. 2nd 20, cert. denied 299 U. S. 586;
> *Holmberg* v. *Anchell*, 24 Fed. Sup. 594;
> *Holmberg* v. *Hannaford*, 28 Fed. Sup. 216, 218-19;
> *Holmberg* v. *Beaumont*, 28 Fed. Sup. 100.

In the case at bar, we are dealing with a particular type of statute and cases decided under other types of statutes, such as those cited by petitioners, are inapposite.

The statute controlling the rights of the respondents in this case is in no wise similar to a statute which vests the power irrevocably to fix the assessment in an individual (as in the case of national banks where it is vested in the Comptroller of the Currency (12 U. S. C. A., Sections 191-

192)), or under the laws of the State of New York where it is vested in the Superintendent of Banks (New York Banking Law; formerly Sections 80 and 113A, now Section 632), or to a statute which permits the Court to fix the assessment binding upon all stockholders wherever domiciled.

Unless the law under which a corporation is organized provides for the fixing of the stockholder liability in *absentia*, which is here not permissible (*Christopher* case, *supra*), or unless the assessment may be fixed by an individual in whom the cause of action is vested, which is also not permissible in this case (*Wheeler* case, *supra*), or unless the statute does not require liability to be imposed "equally and ratably" (which 12 U. S. C. A., Section 812, does require) the jurisdiction of equity is exclusive and the creditor is not permitted to bring an action at law. (*Christopher, Terry, Pollard and Brusselback* cases, *supra*). The jurisdiction being exclusively equitable, legal statutes of limitations are inapplicable.

Petitioners attempt to meet this unanswerable argument by suggesting (pp. 12 to 16, their brief) that since this Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the doctrine of laches, which they argue is a question of substantive law, has been abolished for the District Court sitting in states like New York where it is claimed the doctrine no longer exists.

Assuming *arguendo* that the doctrine of laches is a doctrine of substantive law and has been abolished in New York (Petitioners' Brief, pp. 15-16), it must follow from petitioners' argument that if the statute applicable to actions at law would not be applied in New York in a situation similar to the one here existing it cannot be applied

here. In New York the legal statute is inapplicable where, as here, the action is solely cognizable in equity, or where the jurisdiction is concurrent but the legal remedy is ineffective.

Hanover Fire Insurance Co. v. *Morse Dry Dock and Repair Co.*, 270 N. Y. 86;
Rundle v. *Allison*, 34 N. Y. 180.

In the *Hanover* case, *supra*, at page 89, the New York Court of Appeals said:

> "In an action in equity the ten-year limitation prescribed by Section 53 of the Civil Practice Act is applicable unless, in a particular action, a party has a choice of two remedies, one at law, the other in equity, both complete and adequate, and he selects the action in equity. In that event, the party whose cause of action would be barred under the six-year statute, if he should elect to proceed at law, may not enlarge this time by electing to proceed in equity. Such is the rule where the remedies are concurrent. (Citing cases.)"
>
> "The exception is not applicable in cases of concurrent jurisdiction, however, if a party's remedy at law is inadequate and imperfect and he is required to go into equity to procure complete and adequate relief. (Citing cases.)"

In short, if, as petitioners claim, the New York law is applicable, a legal statute of limitations would be inapplicable in the case at bar since there can be no serious argument as to the inadequacy of the legal remedy (see discussion of inadequacy of legal remedy, *Cago* v. *Brusselback*, 85 Fed. (2nd) 20, at p. 22).

Pursuing petitioners' argument as to the effect of *Erie Railroad* v. *Tompkins* (*supra*), it follows that the three-year statute being inapplicable in New York under the decisions of New York's highest Court, the ten-year statute would apply here, since (a) the action is solely cognizable in equity, or, (b) if we assume the correctness of petitioners' claim that the jurisdiction is concurrent, the legal remedy being wholly inadequate, the same statute, *i. e.*, the ten-year statute, would still be applicable.

In passing, however, respondents desire to point out that the petitioners are entirely mistaken in their definite assertion that

> "The substantive law doctrine of laches (is) not recognized in the State" of New York (top p. 17, Petitioner's Brief).

The existence of the doctrine of laches has been recognized consistently since the passage of the 10-year limitation applicable to equitable actions.

> *Calhoun* v. *Millard*, 121 N. Y. 69, 81-83;
> *Groesbeck* v. *Morgan*, 206 N. Y. 385, 389.

It must follow, therefore, that as the doctrine of laches (which we are assuming to be one of substantive law) is recognized in the State Courts, it must be applied by a District Court sitting in the State of New York if the decision in the *Erie* case (*supra*) is applicable, and it was so applied in the case at bar.

Finally, counsel desire to point out that petitioners state that it was conceded by the Circuit Court of Appeals that if the equitable jurisdiction was concurrent the bar of the three-year statute is applicable (Petitioners' Brief, p. 17).

This statement is entirely fallacious. What the Court said was:

> "If, however, the State statute of limitations is a bar, this suit was brought too late" (R. 423).

The statement of the Court below is by no means tantamount to saying, as petitioners do, that respondent is barred if the jurisdiction is concurrent. What the Court below did say was if the jurisdiction was concurrent, the action would be barred by the legal statute, unless

> "resort to equity is necessary to obtain complete and adequate relief" (R. 424).

That resort to equity is necessary in the case at bar to obtain any effective relief has already been demonstrated.

This renders unnecessary extensive discussion of Petitioners' Point "B" (pp. 17 to 19, Petitioners' Brief) since that argument is based on an erroneous thesis. In order to bolster their argument, petitioners attempt to make it appear that at the time the action was instituted a 100% liability was known to be required (Petitioners' Brief, middle p. 18, note bottom p. 19). This is not the fact and the Trial Court affirmatively found that the respondents did not know that a 100% stockholder liability was necessary (R. 369, 370, findings 21 and 24).

No inequity results to petitioners by virtue of the decision of the Circuit Court.

At pages 22 to 23 of their brief, petitioners undertake to argue the inequity of the holding of the Circuit Court by showing that the named plaintiffs in the case at bar who hold $10,000 face value of bonds may recover more

than their investment if the decision below is upheld. This argument completely overlooks the fact that the suit is representative in nature and is brought on behalf of all the creditors, and that creditors holding over $1,122,000 of claims (R. 383) have intervened (R. 391). There is not a scintilla of evidence that this large number of creditors holding claims in excess of $1,000,000 would not suffer a staggering loss were the petitioners' contentions to be upheld. Furthermore, as pointed out by Judge Knox in the District Court, the petitioners have been fully aware of their liability from the beginning, and have suffered no real prejudice from the delay, and part of the delay in bringing suit is directly chargeable to the obstacles which petitioners placed in respondents' way (R. 348). What petitioners are seeking to do is to erect a purely technical bar to a claim against which no substantial defense exists. It is axiomatic that equity does not look with favor upon such a defense.

POINT II.

Stockholders of record of joint stock land banks are responsible for the statutory liability.

The provisions of the Farm Loan Act fixing the liability of stockholders in Joint Stock Land Banks are the same as in the case of National Banks with the single exception that in the latter case persons holding stock "as executors, administrators, guardians or trustees" are not personally liable, the liability being imposed on the estates and funds in their hands (12 U. S. C. A., Section 66). That there can be no doubt of this, we set out the portions of the two stat-

utes, so far as relevant to the question of the identity of the person liable:

National Banks	Joint Stock Land Banks
Sections 63 and 64	Section 812
"Individual Liability of Shareholders:	"Individual Liability of Shareholders:
The shareholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof * * *, in addition to the amount invested in such shares."	Shareholders of every joint stock land bank * * * shall be held individually responsible * * * for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in and represented by their shares."

We cannot emphasize too strongly the proposition that liability under the National Banking Act, and also, it is submitted, liability with respect to stock in Joint Stock Land Banks, is imposed on the stockholder of record irrespective of his beneficial interest. This liability is imposed not because of estoppel, though that reason is sometimes given, not because by taking the legal title, the former owner may be released, though that reason is sometimes given, and not because by making himself the record owner he entitled himself to the privileges of such ownership and cannot refuse the responsibilities thereof, though that reason too is given, but because, as above stated, the liability is imposed by the statute on the shareholders.

Kenyon v. *Fowler*, 155 Fed. 107, *affirmed* 215 U. S. 593, on the opinion below;
National Bank v. *Case*, 99 U. S. 628, 631.

In the case last above cited, it is important to note that this Court relied upon *Adderly* v. *Storm*, 6 Hill. (N. Y.) 24; *Roosevelt* v. *Brown*, 11 N. Y. 148; *Holyoke Bank* v. *Burnham*, 11 Cush. 183, and *Crease* v. *Babcock*, 10 Metc. 525, in none of which cases was a list of stockholders open to anyone and, therefore, of course, in these cases, which held stockholders of record liable, the element of estoppel was not present.

The identity of liability of registered though not beneficial shareholders in National Banks and in Joint Stock Land Banks has received judicial recognition in all Joint Stock Land Bank stockholder liability cases so far decided.

Brusselback v. *Cago*, 24 Fed. Supp. 524, 534;
Holmberg v. *Anchell*, 24 Fed. Supp. 594, 607;
Friede v. *Mackey*, 10 N. E. (2d) 102 (Supreme Judicial Court of Massachusetts).

In attempted answer, petitioners make two arguments: First, that the language in 12 U. S. C. A., Section 744 (dealing with National Farm Loan Associations), being the same as the language in Section 812, the liability of shareholders of Joint Stock Land Banks should be the same as that of stockholders in National Farm Loan Associations rather than that of stockholders in National Banks (Petitioners' Memorandum, pp. 25 to 28); and second, that because the National Farm Loan Act dealing with Joint Stock Land Banks (Sections 810-24) does not provide for the inspection of stockholder lists by creditors, as does the National Bank-

ing Act (12 U. S. C. A., Section 62) that a different interpretation should be placed on the liability of stockholders of Joint Stock Land Banks. The second argument has been heretofore disposed of by this Court.

National Bank v. *Case*, 99 U. S. 628, and cases there cited.

Petitioners first argument is based on a misconception; to wit, that there is any similarity between Joint Stock Land Banks and National Farm Loan Associations, and overlooks the striking similarity between the method of issuing and holding stock in Joint Stock Land Banks and in National Banks.

Petitioners conclude their argument (Petitioners' Brief, p. 28) by stating that if their "reasoning is correct with respect to the meaning of the phrase 'owned by them' in Section 744," which is the section imposing liability on stockholders in National Farm Loan Associations, "then it seems to us (petitioners) impossible to contend that the identical language in Section 812 relating to Joint Stock Land Banks has any different or wider meaning."

Petitioners' reasoning is fallacious because stock in National Farm Loan Associations was created for a specific and limited purpose. Only a borrower from the Farm Loan Association may be a stockholder and he is required as additional security to pledge his stock to the Association, which is the only pledgee permitted by law (Section 733) and such pledge is the only use the stockholder may make of his stock. This provision is required by law for the security of creditors of the Association. Only $20,000.00 of prospective loans is necessary to form a National Farm Loan Association (Section 717), so that only $1,000.00 min-

imum capital stock is required (Sections 733, 731). If the pledgee (the Association) were held liable because of the pledge, the liability of the Association would thereby be increased and the security of its creditors reduced. Under such conditions, it would appear to be reasonable, although there are no decisions on the subject, that the Association, as pledgee, cannot be liable. Furthermore, as the borrower is entitled to any dividends payable on the pledged stock (Section 733), it must be presumed that the stock, though pledged, remains in the name of the borrower, although this is not specifically provided in the law. Finally, not only is stock ownership in these associations limited to borrowers from the associations, who are required to pledge their stock with the association, but the stock must be retired as the loan is paid (Section 733).

On the other hand, anyone except the United States is permitted to be a stockholder in a Joint Stock Land Bank (Section 813). Unlike National Farm Loan Associations the capital is raised from private subscription and a minimum of at least $250,000.00 is required (Section 815). The stockholders supply the bank's capital and the stock passes freely from hand to hand like stock in National Banks. Indeed, the statute itself allies Joint Stock Land Banks and National Banks by providing that "each shareholder of any such bank (Joint Stock Land Bank) shall have the same voting privileges as holders of shares in National Banking Associations" (Section 813). The stock is not additional security from the borrower as in National Farm Loan Associations; indeed, it is in no way connected with a loan to the stockholder; the idea behind the issuance of stock in National Farm Loan Associations as compared with Joint Stock Land Banks is as different as night and day. In the

former the purchase of the stock is a prerequisite to a loan. In the latter, the purchase is an investment made in the hope of future profit.

The similarity of purpose in the issuance of stock in National Banks and in Joint Stock Land Banks is obvious.

As already pointed out, the provisions of 12 U. S. C. A. 812 are identical with those controlling stockholder liability in National Banks (Sections 63 and 64) except that the words "their stock" used in Section 63 referring to National Banks becomes "the amount of stock owned by them" in the section of the National Farm Loan Act dealing with Joint St - Land Bank stockholder liability. That these two clauses mean exactly the same thing is evident from the fact that later in Section 812 the clause "their shares" is used. As stated, the liability in those statutes is imposed on "shareholders", and the term "their stock" (Section 63) means exactly the same thing as "the amount of stock owned by them" (Section 812). As the Court below well said:

> "We can attach no significance to the fact that the older statute speaks of the stock of shareholders in National Banking Associations as 'their stock', while that of shareholders in Joint Stock Land Banks is designated as 'stock owned by them'. It is as much 'their stock' and stock 'owned by them' in the one instance as in the other. Such a slight change in statutory language does not indicate an intent on the part of Congress to make a substantial difference in the liability imposed" (R. 423).

That decisions under the National Banking Act as a matter of language are applicable to Joint Stock Land Banks is readily demonstrable. Overlooking for the mo-

ment that the liability is imposed on "shareholders" in both statutes, we find that under the National Banking Act it is imposed on shareholders "to the amount of their stock" and upon the shareholders of Joint Stock Land Banks "to the extent of the amount of stock owned by them." To demonstrate that the expressions "their stock" and "stock owned by them" are wholly identical, it is only necessary to transpose the phrase from the third person plural possessive to the first person singular possessive. If this is done, the phrase in the National Banking Act would read "my stock", and the phrase applicable to Joint Stock Land Banks would read "stock owned by me". It, therefore, appears that not only as a question of language, but more important, upon an interpretation of legislative intent, it becomes evident that stockholder liability in Joint Stock Land Banks is akin to stockholder liability in National Banks and has no relation to the presumed liability of stockholders of National Farm Loan Associations.

POINT III.

There is no decision of any other Circuit Court of Appeals in conflict with the decision in this case.

The petitioners have suggested that the decision in the case at bar "is believed to be in conflict with" the decisions of the Ninth Circuit in *Johnson* v. *Greene*, 88 Fed. (2nd) 683, and *Schram* v. *Poole*, 97 Fed. (2nd) 566 (Petitioners' Brief, pp. 6 and 22), and that they believe it also conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Heiden* v. *Cremin*, 66 F. (2d) 943 (Petitioners' Brief, pp. 6 and 29). A very brief analysis of these three cases totally destroys petitioners' contentions.

The *Johnson* case, *supra*, held a legal statute of limitations applicable in an action to recover an 100%* assessment brought by a receiver of a National Bank pursuant to the direction of the Comptroller of the currency. That the statute there involved has no application here has already been pointed out (pp. 4 and 5 this brief). Where the assessment under the National Banking Act (12 U. S. C. A., Sections 63 and 64) follows upon the action of the Comptroller fixing the assessment (12 U. S. C. A., Sections 191 and 192) and the assessment has been fixed at 100% of the stockholders' liability, the action must be brought at law.

Kennedy v. *Gibson*, 8 Wall. 498;
Casey v. *Galli*, 94 U. S. 673.

This Court has decided that a proceeding to recover under the statute here involved must be brought in equity.

The *Schram* case, *supra*, is no more difficult to distinguish. That case purports to follow the holding of this Court in *Pufahl* v. *Parks*, 299 U. S. 217. In the *Pufahl* case, the plaintiff, the receiver of a National Bank, was attempting to reach a fund in the custody of the Courts of the State of California through an action in equity. This Court held that under those circumsfances, the local statute of limitations would be applied where, as in that case, though the petitioner's demand was based upon a Federal statute, it was enforceable only in conformity "to the law of the forum governing the recovery of debts of like nature" (299 U. S. 225).

Similarly, the *Schram* case was an attempt by a receiver of a National Bank to reach funds in the custody of the California Courts. It followed and relied upon the *Pufahl*

---

*"That the assessment was for 100% affirmatively appears in the decision of the District Court, 14 Fed. Supp. 945, 946."

case. The situation there involved has no relationship to the case at bar which is an attempt to enforce exclusively equitable rights *in personam* against individual defendants and not an attempt to reach a fund in the custody of and being administered according to the law of the jurisdiction where the property was located.

Petitioners also say that the decision of the Circuit Court in the case at bar is contrary to the decision in *Heiden v. Cremin*, 66 Fed. (2nd) 943, in which case it was held that a record stockholder in a national bank was not personally liable where the word "trustee" appeared after his name upon the records of the bank. Petitioners' attempted analogy completely disappears when it is remembered that 12 U. S. C. A., Section 66, expressly exempts "persons holding stock (in National Banks) as * * * trustees" from personal liability; an exemption conspicuously absent in the Joint Stock Land Bank liability statute.

Conclusion.

The petitioners have raised no questions which warrant a review by this Court. The decision of the Circuit Court of Appeals for the Second Circuit was required by the decisions of this Court and is so clearly right that a review by this Court would result only in affirmance. Therefore no useful purpose would be served by granting the writ applied for, and the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE A. SPIEGELBERG,
Solicitor for Plaintiffs-Respondents
and Intervenors-Respondents.